(30)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 761

JAMES GALLAGHER,
Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN, JOLIET BRANCH, ILLINOIS STATE PENITENTIARY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. .....

JAMES GALLAGHER,
Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN, JOLIET BRANCH, ILLINOIS STATE PENITENTIARY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE QUESTION PRESENTED.

The question presented is whether the failure of the Illinois Parole Board to recommend parole or commutation of sentence of petitioner involved the denial of any right which is within the purview of the Fourteenth Amendment.

ARGUMENT.

I.

Petitioner has not been deprived of any federal constitutional right by the proceedings or actions of which he complains.

Petitioner seriously misconceives the intent, effect and logic of Illinois' parole laws. In Illinois parole laws have been held valid upon the theory expressed in the laws themselves that the sentence imposed by the court is for the maximum period of confinement authorized by the statute defining and punishing the crime, with the following proviso:

> "* * * it shall be deemed and taken as a part of every sentence, as fully as though written therein, that the Division of Correction, by and with the approval of the Governor **in the nature of a release or commutation of sentence or commitment,** may terminate the term of such imprisonment or commitment earlier than the maximum fixed by the court, as provided in Section 9." (Ill. Rev. Stats. 1943, Ch. 38, sec. 802.)

(Section 9 above referred to authorizes indeterminate sentences in certain crimes, including that of which petitioner was convicted. Id. sec. 801.)

The Supreme Court of Illinois has held this and former similar statutes invulnerable to attack upon the ground that it offends Illinois' constitutional distribution of powers because, as the Supreme Court of Illinois has consistently held, the sentence is for a definite term which is the maximum term provided by law less, of course, *statutory* time off for good behaviour. In effect, all that the Illinois parole law does is to provide a definite rather than an indefinite

sentence for all of the crimes to which it is applicable and to set up administrative machinery for the purpose *merely of advising the Governor*, so that he may exercise his constitutional (not statutory) power of pardoning, the statute being implemented by provisions for the supervision of prisoners whose commutation is conditional upon their good behavior while on parole, making of reports, and the like.

In other words, the statute creates no right either to parole or to release without parole before the expiration of the maximum term provided by the statute. It authorizes, but does not require, commutation of sentence; but it creates no right to such commutation.

Petitioner's brief fails to make it clear to the court that there are three ways in which a prisoner in Illinois sentenced, let us say, for a maximum term of ten years, can lawfully be given his physical liberty (a term which we use advisedly in place of the term "discharge") in less than ten actual calendar years. The first of these three ways is by earning *statutory* time off for good behavior. While the prison authorities do have discretion to determine whether the prisoner has behaved well, if they in fact do determine that he has behaved well, they have no discretion to deny him the *statutory* time for good behaviour. Since their discretion is limited to finding the presence or absence of the statutory *factual* prerequisite to discretion of time of servitude, which prerequisite is good behaviour, they are bound to exercise that discretion reasonably and not arbitrarily.

The other two ways are discharged by the Governor without parole upon recommendation of the Parole Board or parole by the Governor, likewise upon recommendation of the Parole Board.

Parole or discharge without parole before the prisoner

has served the maximum sentence with *statutory* time off for good behaviour, if he has earned it, is not a matter of right with the prisoner. It is purely a matter of the Governor's grace and clemency. Paroles and discharges for less than the service of the maximum time, with time off for good behaviour if such time is earned, are exercises of the Governor's constitutional power to pardon or commute. The function of the Parole Board in recommending such discharges is to purely that of informing and advising the Governor's discretion. There is no right of the prisoner involved. The legislature has not commanded and presumably could not command the Governor to exercise his power of pardon, even in a case that was clearly proper.

Petitioner has sought to clothe with the vestments of a constitutional right what is at most a hope or wish that clemency may be shown him. If the right existed, it would, of course, be attended with the important procedural rights of notice, opportunity to be heard, and finding of facts on at least some evidence, with the further requirement that the discretion, even though broad, must be reasonably exercised. But there is no constitutional right to a pardon or commutation in the nature of a pardon. No right being involved, there is nothing that can be confiscated without due process of law.

It is the position of respondent in this case that the subject matter of petitioner's claim is not within the protection of the Fourteenth Amendment and that therefore there can be no inquiry as to the reasonable or unreasonable character of the refusal of the parole board to recommend what is in effect a pardon.

The case of *People* v. *Lewis*, 376 Ill. 509, cited by petitioner, is in effect strongly adverse to him and his teachings. The court's holding applies to *statutory* good time. As we have pointed out, a prisoner who has behaved well is per-

emptorily entitled to time off for good behaviour. While discretion exists with respect to finding whether he has behaved well, once that fact is found, no discretion exists with respect to whether he shall be discharged. Nevertheless, the opinion explains fully the theory of the Illinois Parole act and makes it clear, although perhaps only by *dicta* and inference, that the right to discharge upon parole or otherwise is, except with respect to statutory good time, a matter of grace and not of right. There being no right, no right has been or could be confiscated.

Conclusion.

For the reasons urged in the foregoing Argument, it is respectfully submitted that no statutory federal question is involved and that the writ of *certiorari* should be denied in this case.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.